I. The First Circuit Correctly Ruled That the NGA Does Not Require a Natural Gas Company to Negotiate in Good Faith With a Landowner Before Commencing a Condemnation Action

The NGA could not be clearer. A natural gas company may condemn property to construct a pipeline provided: (1) it obtains a Certificate of Public Convenience and Necessity authorizing the construction of the pipeline; (2) the use of a particular parcel of land is necessary to comply with the Certificate; and (3) it has been unable to agree with the landowner on the amount of compensation to be paid. Nonetheless, Decoulos maintains that the First Circuit erred when it decided that the NGA does not require a natural gas company to negotiate with a landowner in good faith prior to commencing a condemnation action. Decoulos' argument is not grounded in the statute and was properly rejected.

A. Maritimes Acted in Accordance With the NGA in Taking the Easements on the Trust Property

Maritimes condemned the easement rights on the Trust Property pursuant to § 7(h) of the NGA. That section, in relevant part, states that

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, ***or is unable to agree with the owner of property to the compensation to be paid for***, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way . . . it may acquire the same by the exercise of the

> right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State Courts.

15 U.S.C. § 717f(h) (emphasis added).

Numerous courts construing Section 717f(h), like the district court in the instant case, have granted summary judgment where the natural gas company proved it had a Certificate, the property taken was necessary to comply with the Certificate, and it was unable to agree with the landowner on the amount of compensation to be paid. *E.g.*, *Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 108-12 (D. Mass. 1998) (granting the pipeline company's motion for partial summary judgment on the issue of its authority to condemn after concluding that the company satisfied all three conditions); *see also Rivers Elec. Co. v. 4.6 Acres of Land in Town of Catskill*, 731 F. Supp. 83, 87 (S.D.N.Y. 1990) (granting partial summary judgment on the issue of authority of electric company to condemn property under the power of eminent domain conferred on the company by the Federal Power Act, 16 U.S.C. § 814, where the company held a license from FERC to construct a hydroelectric project); *Rivers Elec. Co. v. .9 Acres*, 1990 WL 52214 (S.D.N.Y. 1990) (same). *Compare Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 973-74 (N.D. Ill. 2002) (applying same three criteria to natural gas company's motion to confirm condemnation of easements).

It is well settled that the district court's function in respect to the taking of the necessary property rights "is limited to evaluating the scope of the FERC Certificate and ordering condemnation as authorized by that certificate."

Guardian Pipeline, L.L.C. v. 529.42 Acres of Land, 210 F. Supp. 2d at 974. This limitation is anchored in the equally settled rule that a FERC Certificate may not be collaterally attacked in a condemnation action. *Id.* at 975 (all objections to natural gas pipeline company's condemnation of land preempted as any such objections should have been raised with FERC or appropriate court of appeals); *see also Williams Natural Gas Co. v. Okla. City*, 890 F.2d 255, 263-64 (10th Cir. 1989) ("The eminent domain authority granted the district courts under . . . 15 U.S.C. 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function under the [Natural Gas Act] is not appellate but, rather, to provide for enforcement"); *Portland Natural Gas Transmission System v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 334 n.1 (D.N.H. 1998) (district court in a condemnation action lacks jurisdiction to entertain any challenge to validity of a Certificate); *Tennessee Gas Pipeline Co.*, 2 F. Supp. 2d at 110 (district court's jurisdiction in an eminent domain action under the NGA extends only to examining the scope of the Certificate and ordering condemnation as authorized by the Certificate: "This Court's rule is one of mere enforcement."); *Kern River Gas Transmission Co. v. Clark County*, 757 F. Supp. 1110, 1116 (D. Nev. 1990) (landowner may not challenge FERC-approved pipeline route in an eminent domain proceeding arising under the NGA); *Tenn. Gas Pipeline Co. v. 104 Acres of Land, More or Less*, 749 F. Supp. 427, 430 (D.R.I. 1990) (challenges to a FERC Certificate can be raised only by rehearing/appeal of FERC Order and landowner may not challenge a FERC Certificate in an eminent domain action arising under the NGA).

In the instant case, the lower courts respected their limited role, as did the other courts cited above, and refused to transgress the boundaries of their authority under Section 717f(h).

It is undisputed in the instant case that all three statutory conditions were satisfied. ***First***, as the holder of a FERC Certificate, Maritimes was authorized to exercise the federal power of eminent domain. *See USG Pipeline Company v. 1.74 Acres in Marion County, Tenn.*, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998) (Certificate "cloaks" natural gas company "with power of eminent domain"). Hence, Maritimes had the unquestioned authority to condemn the permanent and temporary easements (or rights-of-way) on the Trust Property in order to "construct, operate, and maintain" its pipeline and "other . . . equipment necessary for the operation of the pipeline" when it was unable to purchase those easements from Decoulos.

Second, FERC had approved the route of the Phase III Pipeline Project, the size and location of the easements and the other matters relevant to construction and operation of the Phase III Pipeline Project. ***Third***, it was undisputed that Maritimes was unable to acquire the easement rights from Decoulos by contract or agreement. As recounted above, and by the First Circuit, Maritimes' numerous efforts to purchase the necessary easement rights on the Trust Property, including a final offer letter where it offered compensation in excess of twice the appraised value, were rejected. App. 3a. Thus, consistent with the unambiguous language of the NGA, Maritimes satisfied its burden and was entitled to summary judgment and the Order of Taking.

B. Decoulos' Argument Violates Statutory Construction Cannons

Decoulos seeks to craft a new requirement onto Section 717f(h) by requiring that the condemnor prove that it negotiated in good faith with a landowner. Although his argument is painted with a broad brush, Decoulos' particular complaint is that Maritimes' proposed easement referenced more than one pipeline and its proposed Certificate of Payment provided that the amount of compensation paid to Decoulos could not be recorded. Petition at 4, 6; App. 47a, 55a. Decoulos' good faith argument is not grounded in the NGA and in fact is contrary to the plain language of the NGA. As the First Circuit observed, "it is unclear to what Decoulos anchors his claim that good faith negotiations must precede the filing of the condemnation action, as the NGA contains no specific language to this effect." App. 5a. The First Circuit aptly commented that "[a]bsent any credible authority making good faith negotiations a requirement precedent to the condemnation action . . . we decline the invitation to create one in this case." *Id.* The First Circuit was correct to do so.

The preeminent canon of statutory interpretation requires a court to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Thus, the inquiry begins with the statutory text, and ends there as well if the text is unambiguous. *Lamie* v. *United States Trustee*, 540 U.S. 526, 527-28 (2004).

Here, the statutory text requires only that the natural gas company and the landowner are unable to agree on the amount of compensation to be paid for the property rights sought. The natural gas company's obligation extends only to offering an amount as compensation for the property rights. It certainly does not require a company to negotiate the terms of an easement with the landowner. If the landowner does not accept the company's offer, then the company has to file a condemnation action to acquire the necessary easement rights. Therefore, provided the company offers an amount (here, the amount was more than twice the value reached by an independent appraiser) and the landowner rejects it, the "unable to agree" requirement is satisfied. A single offer from the condemnor, ignored or rejected by the landowner, satisfies the unable to agree requirement. On its face, the statute does not require any negotiations; *i.e.*, it does not require that the condemnor wait for a counter-offer or make a second, or third offer. Nor can a duty to negotiate about compensation or anything else, and to negotiate in good faith, be implied.

Decoulos' argument that a natural gas pipeline should be required to prove that it has negotiated in good faith as a condition to taking property has also been rejected by at least one district court. In *Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253 (D. Kan. 2002), the district court rejected a landowner's argument that the natural gas company failed to negotiate in good faith. The court explained that:

> The plain language of the NGA does not impose an obligation on a holder of a FERC certificate to negotiate in good faith before acquiring land by exercise of eminent domain. . . . The statute only requires that the party seeking to condemn be

> unable to acquire the property by contract or unable to agree on compensation to be paid for the property. The court declines to demand more than the statute requires by its terms.

Id. at 1257.

The Kansas district court further stated that its holding was "consistent with" this Court's decision in *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (holding that the ICC's decision that Amtrak did not have to show that it engaged in good faith negotiations to buy a property before seeking condemnation was "a reasonable interpretation of the phrase 'unable to agree upon terms for the sale'"). The Kansas district court noted that it was undisputed that the pipeline company offered to lease or purchase the property from the landowners who rejected both offers. *Id.* at 1258. That evidence was sufficient to satisfy the requirement that the pipeline be "unable to agree with the owner of property to the compensation to be paid for" the property. *Id.* Hence, the court held that the pipeline company had "satisfied the statutory requirements for condemnation and is entitled to summary judgment on this issue." *Id.* The First Circuit cited this Kansas decision. App. 5a. Decoulos ignores it.

This Court has stated that federal courts do not have the "authority to 'rewrite a statute and give it an effect altogether different' from what Congress agreed to." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 562 (2001); *see also Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000) (noting that "our job is to determine the meaning of the statute passed by Congress, not whether wisdom or logic suggests that Congress could have done better"); *United States v. Charles*

George Trucking Co., 823 F.2d 685, 689 (1st Cir. 1987) (noting that "courts have no warrant to rewrite statute in the guise of 'interpretation'"). In short, Decoulos' argument requires the Court to rewrite section 717f(h) and thereby violate the preeminent canon of statutory interpretation.

C. Maritimes Negotiated in Good Faith with Decoulos

Some district courts have discussed whether a natural gas company negotiated in good faith with a landowner. Those courts, however, never explained how they concluded that the company had an obligation to dos so. Maritimes maintains that those cases were incorrectly decided. Moreover, it appears that those courts simply indulged the landowners' argument because it was so obvious that the company acted in good faith. Those courts also limited any duty to negotiate in good faith to the matter of compensation for the property rights in question. *See Transcontinental Gas Pipeline Co. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (E.D. La. 1990) (natural gas company engaged in good faith negotiations with the owners of the land by communicating with each at least two times and making an offer for an easement equal to or greater than the appraised value as determined by the company's appraiser); *Tennessee Gas Pipeline Co. v. New England Power Co.*, 6 F. Supp. 2d 102, 105 (D. Mass. 1998) (ample evidence that pipeline company negotiated in good faith given its various offers to pay trailer owner's moving expenses); *USG Pipeline Co. v. 1.74 Acres in Marion County, Tennessee*, 1 F.Supp.2d at 821-24 (E.D. Tenn. 1998) (pipeline company satisfied its obligation under the NGA where it engaged in negotiations with landowners over six months and made monetary offers it considered reasonable); *Kern River Gas Transmission Company v. Clark County*, 757 F. Supp. at 1113 (holding that natural gas

company had engaged in good faith negotiations where the parties had negotiated for several months prior to commencement of condemnation action).

If Maritimes had an obligation to negotiate in good faith with Decoulos, it clearly did so. First, Maritimes engaged in substantial negotiations with Decoulos in an effort to purchase the necessary easement rights prior to filing the condemnation action. Second, Maritimes had an appraisal of the fair market value of the easements performed by an independent, licensed Massachusetts real estate appraiser. Third, Maritimes offered to pay Decoulos an amount that was greater than the appraised amount of such easement rights.

Hence, as matter of law, Decoulos' argument is untenable and, as a matter of fact, his argument is a fiction.

II. Decoulos' Cases Are Inapposite

To gain a toehold, Decoulos attempts to manufacture a conflict. Petition at 5-6. He first argues Federal Rule of Civil Procedure 71A(h) as construed by this Court requires the trial judge to decide all issues, legal and factual, that may be presented, except for compensation. Petition at 6 (citing *United States v. Reynolds*, 397 U.S. 14 (1970)). The issue in *Reynolds* was whether the "scope-of-the-project" question is to be determined by the trial judge or by the jury. *Id.* at 20. It is unclear whether Decoulos is arguing that the judge or the jury should decide the issue of good faith, or whether he even has an opinion on that issue. In any event, his argument fails because it erroneously presumes that good faith negotiation is an issue under the statute. Since it is not, there is nothing for the judge, as distinct from the jury (or vice-versa), to resolve.

Second, Decoulos relies on *United States v. Carmack*, 329 U.S. 230 (1946), where this Court discussed good faith in the context of the selection of a site for a post office. Nothing in *Carmack* remotely suggests a condemner must act in good faith when negotiating compensation with the landowner or even negotiate at all.

The lower court decisions on which Decoulos relies are equally unavailing. Rather, Decoulos' argument simply consists of cherry picking statements from some cases that are light years away from the instant case. His cases either involved challenges to the authority of an administrative agency of the United States to take property or raised an issue as to whether the taking involved a public use. Petition at 7-8. But under the NGA, the issue of whether the natural gas company has the authority to take the property interest is vested in FERC and immune from judicial review. Unlike the cases Decoulos relies upon, FERC has the final word. Thus, to the extent Decoulos' cases are still good law, they only suggest that a court may review the decision of a federal administrative agency to condemn the property in question in very limited circumstances. They do not in any way suggest that the federal government is obligated to negotiate or negotiate in good faith with landowners before taking their property. Therefore, the cases cited by Decoulos do not support his argument that the NGA allowed the district court to examine the propriety of Maritimes' taking.

With respect to Decoulos' particular claims (that Maritimes proposed easement referenced multiple pipelines and that the Certificate of Payment provided that it should not be recorded), he again cites no case in which a court has even suggested that a natural gas company is obligated by the NGA to negotiate the terms that are to be included in a

grant of easement or any other type of agreement with a landowner before the company can condemn the easement or any other property interest. Moreover, since Maritimes only offered to purchase easement rights on certain conditions, Decoulos was free to reject Maritimes' proposal and that he did. It is incomprehensible how that shows that Maritimes acted in bad faith and harmed Decoulos.

III. Imposing a Duty of Good Faith Negotiations as a Precondition to Condemnation Would Open a Pandora's Box.

Assuming that a court could even do so, there are myriad compelling reasons why a good faith negotiation requirement should not be added to the NGA. First, landowners do not need the protection of a good faith duty. The statute as written protects landowners. If a landowner is dissatisfied with the company's offer, he can simply await his day in court and try to prove the amount he believes he is owed.[2] The company has a substantial incentive to make a reasonable offer to a landowner in order to avoid the costs and hassle associated with a condemnation proceeding. Furthermore, such a requirement would give landowners unfair leverage over the pipeline company.

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2. FERC determined that the route of the Phase III Pipeline Project would traverse Decoulos' property. If Decoulos wanted to challenge the decision to put the pipeline on his property, he could have sought a rehearing of FERC's determination and then taken an appeal to the D.C. Circuit or the First Circuit. *See* 15 U.S.C. § 717r (a)-(b). But since Decoulos never did that, Maritimes' FERC Certificate was immune to attack in the district court. *See, e.g., Tenn. Gas Pipeline*, 2 F. Supp. 2d at 210 (discussing statutory framework for challenging a FERC decision). His attempt to create an end run around Section 717f(h) should not be countenanced.

Specifically, if the law were as Decoulos advocated, a public pipeline project could be held hostage to the desires of a single landowner. Any landowner who wanted to hold up a pipeline project or to be paid more money than the pipeline company was offering would need only to claim insufficient negotiations or lack of good faith and the district court would then have to engage in extensive fact-finding. (Many pipeline projects affect hundreds and even thousands of landowners.) In the interim, the pipeline company might be unable to proceed with construction, thereby delaying the pipeline project and costing the pipeline company money that it would not be able to recover. Such a delay would not merely inconvenience the company; it could cause a substantial delay in the delivery of much needed fuel to numerous residents and businesses. Imposing a judicially-created requirement of good faith could also further drain scarce judicial resources by involving district courts (and presumably juries) in reviewing pre-condemnation negotiations.

Landowners should not be able to convert the unable to agree requirement into a minefield that the natural gas company must navigate with the hope that it will step on one of the mines. To activate these mines, a landowner may: (1) seek to drag out negotiations by being unavailable or by requesting voluminous materials from the company; (2) refuse to respond to the company's offer; or (3) fail to communicate complaints about an offer at the time it is made, but rather "lay behind the log," and then raise complaints for the first time after the company files suit in the hope that the company will be inclined to pay the landowner settlement damages above its offer and above fair market value. Hence, crafting a duty to negotiate in good faith could lead to a host of problems.

Finally, adding a duty of good faith also raises many procedural issues unanswered by Decoulos. For example, if the court found a lack of good faith on the part of the pipeline company, what would be an appropriate remedy? Would the pipeline company have to begin negotiations again? Also, what if the landowner failed to negotiate in good faith and thereby delayed construction of a pipeline? Would the pipeline company have a remedy against the landowner? It is neither prudent nor good policy to police negotiations when a trial can always resolve the amount of compensation the landowner is owed. In sum, it is obvious that adding a good faith negotiation requirement is fraught with danger: it could delay the distribution of much needed natural gas, strain scarce judicial resources, create novel issues of law and in the end be inefficient and uneconomical.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for the writ of certiorari.

Respectfully submitted,

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